IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 7433

UNITED STATES OF AMERICA,

Appellant,

vs.

MARTHA LaFAVOR, as Administratrix of Estate of CHARLES V. LaFAVOR, deceased, and LUCY ANN LaFAVOR,

Appellees.

Upon Appeal From the District Court of the United States for the Western District of Washington, Southern Division.

HONORABLE EDWARD E. CUSHMAN, *Judge*

BRIEF OF APPELLANT

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FILED

AUG - 1 1934

BRIEF PRINTING COMPANY

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BRIEF OF APPELLANT

STATEMENT OF THE CASE

The appellees, hereinafter called plaintiffs, by their third amended complaint (Tr. 2-5) sought to recover disability benefits against the United States on a war risk insurance policy held by CHARLES V. LaFAVOR. Inasmuch as Three Thousand Dollars

($3,000.00) of the original Ten Thousand Dollars ($10,000.00) term insurance was converted, the plaintiffs sought by their complaint to recover disability benefits only on Seven Thousand Dollars ($7,000.00) of the original term insurance (Tr. 4). It was alleged in the complaint that in January, 1918, while in the service, the assured contracted scarlet fever and pleurisy; and that later, in September, 1918, he was wounded from a fragment of a high explosive shell and from concussion was thrown into a shell hole and partially buried, causing a severe shock to his nervous system, and complicated injuries to his spinal column. As a result of the foregoing, it is alleged he developed hypertrophic arthritis of the lumbar spine, causing partial paralysis of the left leg and internal injuries to his lungs, liver and heart, by means of which it was claimed that he was unable continuously at the time of discharge and lapsation of his insurance to follow any substantially gainful occupation. And there was likewise present the usual allegation that said condition was then reasonably certain to continue throughout the remainder of the natural life of the assured (Tr. 3-4).

It was stipulated between counsel that the Government's answer to the second amended complaint

should stand as the answer to the third amended complaint (Tr. 10).

In its answer, the United States admitted that the assured died January 11, 1932, and that while in the service he applied for and was granted a policy of war risk term insurance in the amount of Ten Thousand Dollars ($10,000.00), which policy had included therein the usual disability benefits. Then it was affirmatively alleged that the Ten Thousand Dollar ($10,000.00) term policy lapsed for non-payment of the premium due thereon April 1, 1919, and was not in force and effect thereafter, and that Three Thousand Dollars ($3,000.00) of the term insurance had been reinstated and converted and was in force at the time of the assured's death (Tr. 7-8). At the outset it might be well to state that there is no dispute between plaintiffs and defendant as to defendant's liability on the Three Thousand Dollars ($3,000.00) converted contract, and that the sole issue below was defendant's liability with reference to the disability benefits on Seven Thousand Dollars ($7,000.00) of the term insurance (Tr. 79-80). Although a disagreement was denied in defendant's answer (Tr. 7), the United States, in the trial below, in effect admitted the existence of the disagreement (Tr. 78).

After a trial which lasted approximately a week, and after denial of proper motions made by the defendant to withdraw the case from the consideration of the jury (Tr. 91-92 and 134-135), the jury were correctly instructed by the trial Court, and returned a verdict in favor of the plaintiffs, finding the assured permanently and totally disabled during the time his term insurance contract was in force and effect (Tr. 11).

A motion for a new trial on the part of the Government was denied (Tr. 16), and a judgment based on the verdict was entered, covering the usual disability benefits due since discharge, in favor of the plaintiffs against the United States, on the 17th of October, 1933 (Tr. 13-14).

Feeling aggrieved by this judgment, the Government appeals.

There are three questions to be considered by the Court on this appeal. Two of them relate to the rulings of the trial Court in admitting evidence on behalf of the plaintiffs. The first contention of the Government is that the Court erroneously admitted in evidence plaintiffs' exhibits 11, 12 and 13 (Tr. 36-38).

Assignments of error seven and eight (Tr. 151). deal with certain x-rays which were not properly identified and the only testimony with reference to which was the testimony of the doctor who interpreted the same. In fact, the x-rays were taken by another doctor on the floor above him, in the absence of the doctor who interpreted the same.

The second and other error complained of in admitting evidence will be found in assignments of error five, six, nine and ten (Tr. 149-152), which deal with the alleged error of the trial Court in allowing lay witnesses to testify as to complaints made by, and conversations had with the assured with reference to his physical condition when there was no mental disability in issue.

The last assignment of error deals with the Court's refusal to take the case from the jury, and its denial of the Government's motion for an instructed verdict at the end of all the testimony.

These assignments will be found at pages 147 and 148 of the Record. All other assignments of error are waived.

SPECIFICATIONS OF ERROR

I.

The District Court erred in denying defendant's motion for a non-suit which motion was made at the close of plaintiffs' case, for the reason and on the ground that the evidence of the plaintiffs failed to make out a prima facie case sufficient to warrant the submission of the issue to the jury, and on the further ground that the plaintiffs' evidence had not made out a prima facie showing of total and permanent disability within the meaning of the law of disability during the time the insurance sued on was in force and effect; and on the further ground that the evidence (20) adduced affirmatively showed that during the time the insurance sued on was in force and effect, the insured, Charles V. LaFavor, was not totally and permanently disabled to which denial of motion for non-suit defendant took exception.

II.

The District Court erred in denying defendant's motion for an instructed verdict at the end of the entire testimony which motion was made for the reason and upon the ground that the evidence of the plaintiffs failed to make out prima facie case

sufficient to warrant the submission of the issue to the jury, and on the further ground that the plaintiffs' evidence had not made out a prima facie showing of total and permanent disability within the meaning of the law of disability during the time the insurance sued on was in force and effect; and on the further ground that the evidence adduced affirmatively showed that during the time the insurance sued on was in force and effect, the insured, Charles V. LaFavor, was not totally and permanently disabled, to which denial of motion for an instructed verdict defendant took exception.

III.

The District Court erred in admitting the following testimony of witness Julius Englund over objection of defendant:

Q. Now, you may state what you saw, what you noticed about his appearance that was different than from when you saw him in Camp Lewis, will you state to the jury what you noticed about him that was different?

A. Well, there was quite a difference in him; he was going around limping.

Q. He was limping?

A. Yes.

Q. What else?

A. Complaining about his side.

Mr. DeWolfe: We move to strike that as hearsay.

The Court: Overruled.

Mr. DeWolfe: Exception.

The Court: Motion denied.

Mr. DeWolfe: Exception.

The Court: Allowed.

IV.

The District Court erred in admitting in evidence the following testimony of witness William Hartwich over objection of defendant:

Q. What were you doing?

A. My brother-in-law and I were digging a well and he came up (as we were interested in getting some water) and he came up to see how the well was coming along and we asked him to look into it; he says, "No, I can't look down."

Mr. Whitley: I object to what he said.

The Court: Objection overruled.

Mr. Whitley: Exception.

The Court: Allowed (22).

Q. He said on account of what?

A. He said he could not look down the well, he said.

Q. What else?

A. He said his heart bothered him and he didn't dare look down—

Mr. DeWolfe: We object to that as hearsay.

The Court: Overruled.

Mr. DeWolfe: On that point, I would like to have your Honor reserve the ruling on that for the reason the authorities hold unless the disability claimed—the statements of the insured are not admissible in evidence even on the testimony of the experts unless showing is made that the expert took that history for the purpose of treating him and not for the purpose of testifying in the trial here—we are deprived of the right of cross-examination. I can produce the authorities at 2:00 o'clock.

The Court: You may produce them at 2:00 o'clock; the general rule is that a person's statement, explanatory of an act, is not hearsay.

Mr. DeWolfe: The only case I found that admitted such statements was explanatory of the mental condition of the insured—other cases ruled them out even when taken by a physician.

The Court: The objection is overruled.

Mr. DeWolfe: Exception.

The Court: Allowed.

V.

The District Court erred in admitting in evidence plaintiffs' Exhibit No. 11 purporting to be an x-ray of the assured on the ground that said exhibit was not properly identified.

VI.

The District Court erred in admitting in evidence plaintiffs' Exhibit No. 12 purporting to be an x-ray of the assured on the ground that said exhibit was not properly identified.

VII.

The District Court erred in admitting over the objection of the government, the following testimony of witness Bessie Elliott:

Q. Will you just tell the jury how Charles LaFavor acted before and after the blasts were set off?

A. Tell how he acted?

Q. Yes.

A. Well, my husband, he dug holes and set the blast and Mr. LaFavor says "Here's where I am going to get out of here" he says—

Mr. DeWolfe: (Interrupting) I object to that as self-serving.

The Court: It seems to be a statement made, accompanying an act as explanatory of the of the act, objection overruled.

Mr. DeWolfe: Exception.

The Court: Allowed.

VIII.

The District Court erred in admitting the following testimony of witness Martha M. LaFavor over the objection of the government:

Q. How long would the spells last?

A. They would come on two days before he got them.

Q. Yes?

A. And then when he got through abusing me,—

Q. What did he do?

A. He would lie down and sleep, and when he woke up he said "Where did (24) you get those bruises?" I said, "Don't you know?" and he said he did not know.

Mr. DeWolfe: I will object to that. There is no mental disability pleaded.

The Court: Objection overruled.

ARGUMENT

I.

SUFFICIENCY OF EVIDENCE

It is not thought necessary to burden the Court with the pertinent statutes and regulations involving promulgation of war risk term insurance, or the definition of permanent and total disability thereunder,

inasmuch as this Court has had occasion to consider numerous cases of this type and is thoroughly familiar with the issues involved. Suffice it to say that to recover in this case, it was necessary for the plaintiffs to prove and sustain the burden that rested upon them, to show by the greater weight of the evidence that the assured was, on or before midnight, April 30, 1919, unable to follow continuously any substantially gainful occupation, and that at that time it was then reasonably certain that said condition would continue throughout the remainder of his natural life.

It is undisputed that no premiums were paid since discharge (Tr. 79).

Seeking to carry the burden that rested upon them, plaintiffs introduced the assured's wife as a witness, together with medical experts who made physical examinations of him, and also certain of his friends and co-workers, together with certain reports of medical examinations made by government doctors who examined the assured during and subsequent to his military service. The entire testimony is too voluminous to quote at much length, but it will be necessary to go into a portion of the same in order to properly substantiate the government's posi-

tion that the case should not have been submitted to the jury.

Julius Englund testified on behalf of plaintiff in part as follows:

> "I was in the military service during the World War with the assured and met him in the hospital at Fort Lewis, Washington, in 1918. I then saw the assured in France (Tr. 22), and again saw him at Cushman Hospital in Tacoma in the early part of 1927 (Tr. 23). I noticed when I saw the plaintiff in 1927 at Cushman Hospital that there was a difference in him: he had not limped at Fort Lewis, and he was also complaining about his side; and I noticed the difference in his complexion, that his complexion was more sallow; and noticed the difference in his posture, and that he walked with a cane, stooping over forward; and that the assured at that time made no complaint about his heart, but complained about a pain in his chest. The assured was like all the rest of the patients—able to get up at his leisure." (Tr. 25)

William Hartwich testified in part as follows:

> "I met the assured around April, 1931. He was trying to erect a house near mine, in Tacoma. The assured's wife did most of the work. The assured did most of the light work, like hammering and fitting up the house, but never worked long hours. That was in the summer of 1931. He would stay on this work from about 10 o'clock in the morning until 4 o'clock in the afternoon (Tr. 26). The plaintiff stated that he could not look down into a well which I was digging, because his heart bothered him.

The assured was always kind of stooped. He did not have a cane. His complexion was sallow and yellow. He had a twitch to his face."

On cross examination, Mr. Hartwich testified in part as follows:

> "The assured would drive the car by my house in 1931. I did see him doing some work on the house—very light work—as early as 10 o'clock in the morning and as late as 4 o'clock in the afternoon." (Tr. 29)

The assured's wife, Martha M. LaFavor, testified in part as follows:

> "When he went into the military service of the United States, he weighed approximately 175 pounds (Tr. 32)."

The service records, however, plaintiffs' Exhibit No. 14, show his weight upon induction into the army to be 140 pounds, and the medical examination made as a part of assured's application for reinstatement of his term insurance—government's Exhibit A-7—which application was dated January 25, 1921, shows his weight two years subsequent to discharge to still be around 140 pounds.

Mrs. LaFavor further states:

> "The assured was healthly before induction into the army (Tr. 32). When he came home from the war he was lying on the bed and

> walked with a cane. His mouth was full of blisters, and his eyes were bloodshot. He was blue and yellow, and thin. He weighed only 130 pounds (Tr. 33)."

At this point Mrs. LaFavor was withdrawn temporarily from the witness stand, and Dr. W. H. Gearing testified in behalf of plaintiffs, on direct examination, in part as follows:

> "I first examined the assured on October 14, 1931."

The history given him by the patient will be found on pages 34 and 35 of the records. He likewise interpreted certain x-rays which were admitted to evidence (Tr. 35-37).

> "From my examination I found the condition of traumatic arthritis. It is possible to assume that the injury he received in France was the exciting cause of the trouble, but what caused the arthritic process was problematical. It may have been due to injury and chronic infection of some sort. His history as given was that of extensive illness, influenza, pleurisy, which are infections which very likely produce an arthritis. The term "traumatic" means as the result of an injury (Tr. 39).
>
> "From my examination of Mr. LaFavor, I would say that his was a chronic condition, or one of long standing, (Tr. 39) *but the exact time of the condition would be difficult to tell*, but I presume a period of years. It is my opinion that

the arthritis originated as a result of the injury sustained at the time of the injury in battle, or whenever the injury occurred. (Tr. 39). At the time I saw the assured, I did not think he could follow the occupation of a farmer. (Tr. 41)."

On cross examination, he stated in part:

"*It is difficult to say how long the arthritic process had been going on, but that it was probably a matter of years rather than just the last week or so, and the process would assume the proportions that are shown by the x-ray in two or three years.* The conclusion is that the arthritis was traumatic in origin, and from the history of the infectious diseases and the injury received, I arrived at the opinion that it was a traumatic condition. *Without any injury or trauma, the same condition could have been shown. If it resulted from tonsilitis or prostatitis, without any trauma or injury, the same condition could have been shown.* (Tr. 42-43).

"*Arthritis is a progressive disease. After trauma or injury it usually comes into being practically immediately, from the standpoint of the patient's complaints; but from the standpoint of the infection, it may be harbored for years before the symptoms begin* (Tr. 43)."

Dr. John Steele testified in part as follows, on direct examination:

"I examined the assured first on October 10, 1931 (Tr. 44). He was in my office the second time, but I just saw him at that time and did not examine him, but prescribed for him (Tr. 44-45). I did not find active tuberculosis, but merely noted the case as one for observation for

activity (Tr. 46). There was nothing in the examination of the heart to make a diagnosis of angina pectoris or coronary arterio-sclerosis, and no tubercle bacilli were revealed by the examination (Tr. 47).

"The patient gave a history of having a pain in wrist, and having been gassed, shortness of breath, and pains in the chest and shoulders and arms, trouble with his back, and difficulty in walking (Tr. 48). He also gave a history of pleurisy at Camp Lewis, scarlet fever, and spinal meningitis or diphtheria (Tr. 49) since his induction into the service. An autopsy was performed on the person of the assured after he died in January, 1932 (Tr. 49). From this autopsy I found a chronic heart condition (Tr. 51) that must have existed for many years."

On cross examination, he stated in part that:

"The only diagnosis I made as to the lungs was a diagnosis of chronic pleurisy fibrous and inactive tuberculosis (Tr. 53). *I did not make any physical findings or any objective findings that would sustain the diagnosis of angina pectoris.* Very seldom can this be done (Tr. 53). In the heart condition the patient gave a history of attacks of pain starting in the chest and radiating to the arm, which were typical of angina pectoris. He did not say that word himself, because he did not know about it but it was very similar to angina pectoris attacks (Tr. 53). He said he had had attacks every year since the war.

"The cause of angina pectoris may be infection, or overwork, overstudy, strain, grief-stricken, or anything that will bring some additional work on the heart, or any additional infection on

> the heart (Tr. 54). *Not many people can have angina pectoris for about ten or twelve years and have many attacks and still survive, but there are cases on record that do have* (Tr. 54). *As far as my examination of October* 10, 1931, *is concerned, there were not any objective symptoms there of angina pectoris.*
>
> "The first time that any physical findings of angina pectoris were made was at the time of the autopsy (Tr. 55). The patient did not give me any history of his industrial activities or vocational training since discharge, and did not tell me about the period of time he spent on a farm at Colville."

In *United States vs. McShane*, 70 F. (2d) 991, wherein it was shown that the assured was honorably discharged on August 5, 1919, after being returned from France because of tuberculosis contracted in service, that the tuberculosis was arrested for some three years after March, 1919, and that after return the assured attended the University and acted as salesman, but died of tuberculosis in 1927, the facts were held insufficient to show permanent and total disability on March 24, 1919, when the policy lapsed, so as to warrant recovery on the policy.

Bertha Nehring testified in part as follows, on behalf of the plaintiffs:

> "The assured rented a house from me in 1928 and 1929. He appeared nervous and easily agitated about anything, and was pale and thin

and did not carry himself erect. He changed the tone of his voice when talking. I did not see him do any work (Tr. 57). I did not know anything about him previous to 1928 (Tr. 58."

James Elliott testified in part as follows, in behalf of the plaintiffs:

"I met the assured about 1929 (Tr. 58). After that, when the assured moved in my neighborhood, I saw him once a week, but never saw him do any work. He did not have a very good complexion, and limped a little bit in one leg. He was afraid when I was blasting with dynamite, and ran up the road (Tr. 59)."

Bessie Elliott testified in behalf of the plaintiffs that:

"When my husband was blasting with Mr. LaFavor, Mr. LaFavor stated that he was 'going to get out of here because powder makes me sick and bursts my head'—so he ran up the road with his hands over his ears, and was pale and scared." Tr. 60)

Whereupon the interrogation of the plaintiff, Martha M. LaFavor, was resumed, and she testified further in part as follows:

"From late April, 1919, he walked with a cane for two months. He did not do any work. He used the cane for three months.

"*We were married in March*, 1920 (Tr. 62). He worked from March, 1920, until October, 1920, in a flour mill sitting down sewing sacks

(Tr. 62). He worked three hours a day, sometimes four. He did not work for a power company that I know of (Tr. 62). He lay down in the daytime for an hour at a time. (Tr. 63)

"He was in vocational training from 1920 until 1922 (Tr. 63). He went to the Sacred Heart Hospital in July, 1921, in Spokane (Tr. 63) to have his tonsils taken out. He went to Sand Point in 1922 for two months, and came home sick. Then he went to Moscow, Idaho, where we got some more vocational training in poultry work. When he was in Moscow he went to work at nine in the morning, came home at noon and rested for two hours, then went back to work until four, then came home.

"We then went to Colville where we purchased a farm, and the government furnished the implements (Tr. 64). We lived on the ranch at Colville from 1923 to 1928 (Tr. 65). We have three children (Tr. 65). On the ranch Mr. LaFavor did not do any work. I did all the work. During that five-year period we did not work for anybody else.

"During the winters from 1924 until 1928 he did spend a couple of months at Cushman Hospital (Tr. 65). He came back from the trips to Cushman apparently improved in appearance and health. We sold the ranch in 1928, and came to Tacoma (Tr. 65) and from 1928 until 1931 lived in South Tacoma. During that latter period he did not do any work (Tr. 66). He weighed 128 pounds in 1929 (Tr. 66). We moved out to a little ranch in East 72nd Street in Tacoma in July, 1931. That is where I now live. My husband helped me build the house there, but I did most of the work.

"My husband died January, 1932 (Tr. 66). During the 12 years that we were married, I

> never saw him do any heavy manual labor (Tr. 66). *Part of the time since discharge from the service, by husband manifested extreme anger toward me, but the first time that he did so was in* 1923 (*Tr.* 67). *The occasion was his run-down condition.*"

It will be noted that Mrs. LaFavor's testimony with reference to the work of her husband on the farm and his work immediately subsequent to discharge is contradicted by other witnesses in many material matters. For instance: It was shown undisputedly by the testimony of other witnesses that the plaintiff did some work on his farm from 1923 to 1928, and that he worked in a power plant subsequent to his discharge, which his wife denied.

Mrs. LaFavor testified further in part that:

> "Two days before my husband's spells came on, he had a headache and his mind was somewhere else. He would go on talking to himself. Then he would say something and hit me, and then lie down and sleep for several hours (Tr. 68). He would have these spells about two days a month, and once a month (Tr. 74). He took aspirin for his headache right along. They got worse since 1923 (Tr. 75). I saw him lose his balance and fall in 1931. He was not able to hold any food part of the time (Tr. 76). He never worked at a power plant that I know of (Tr. 82);
>
> "In January, 1920, he went to the Northwestern Business College. He left the flour

mill to go to business college at Spokane, to take vocational training (Tr. 85). After he got out of business college training he went on the McPherson Poultry ranch in 1922 at Sand Point, Idaho, to help with the chickens. After that he went to the University of Idaho for training (Tr. 85). He continued at the University of Idaho until 1923. My husband never worked with Mr. Bloom at or near Colville (Tr. 86)."

John M. Gilbo testified by way of deposition in behalf of the plaintiffs in part as follows:

"I knew the assured in France in 1918. The day I got acquainted with him he was not feeling very good. Next time I met him he was complaining about the pain in his breast. He mentioned about his left side. After he had eaten he complained about being ill. We were going in swimming, but went to the barracks instead. He said he did not want any lunch, he had some with him. He mentioned he did not feel well in the left side, but did not say anything about his heart. I saw him about four times (Tr. 89).

"The next time I saw him was in 1926, at Cushman Hospital in Tacoma. He was a lot more sickly, paler and thinner. He was limping a little. He mentioned his heart once at that time."

On cross examination, Mr. Gilbo stated that:

"The last time I saw him in France was on a divisional hike with him. The hike was 41 kilometers. The kilometer is five-eighths of an American mile."

The government moved for a non-suit on the ground that the evidence was insufficient to warrant the submission of the case to a jury, but the motion was denied by the Court, and an exception allowed (Tr. 90-91).

The testimony on behalf of the government will be referred to but briefly, as it is contended that the plaintiffs, by their own testimony, failed to make out a *prima facie* case sufficient to go to the jury, and the defense testimony will be referred to only insofar as it goes to corroborate the insufficiency of the assured's claim of permanent and total disability at the time his term policy lapsed.

Mr. Westmore, of the Northwestern Business College stated that the assured was in vocational training at his school from October, 1920, until March, 1922 (Tr. 92-93).

Mr. Harvey Bloom, a neighbor of the assured's at the time he was living on his ranch near Colville, from 1923 to 1928, stated that:

> "During that period of time I saw the assured plowing, working in the orchard, and constructing some buildings, and saw him cutting and hauling wood, and I worked with him in threshing. He did carpenter work on his chicken house, and also on his dwelling house.

I have seen him take care of his chickens. We had arrangements with regard to exchange of work (Tr. 94). I went down and helped him two or three days on his house, and in return he was to help me with a little pruning the next spring in my orchard (Tr. 94). In one job we pitched bundles off the stack and into the machine, threshing, both of us together. He had 300 baby chickens in the first year, and a horse, a cow or two, and some hogs. I saw him milking the cows and taking them to and from pasture, and never saw him limp or use a cane, and never heard him complain or saw him sick (Tr. 94-95)."

George W. Johnson testified in behalf of the government by way of deposition in part as follows:

"After the assured returned from the army, I saw him in May, 1919. He was working during the spring and summer of 1919 in the mill. I believe he worked at the electric light plant after he worked at the mill. He was a fireman and shoveled coal (Tr. 100). I think they paid $100.00 or $125.00 for that work (Tr. 100)."

W. B. Heppner testified in part as follows, by way of deposition:

"I saw the assured in the spring of 1919 at the flour mill. As far as I know. he worked there about a year. He was sacking flour (Tr. 101)."

Paul Crum testified by way of deposition, on behalf of the government, in part as follows:

"I knew the assured in the early summer of 1919 to the fall of 1920, and knew that he worked in the summer of 1919 as fireman in the electric plant at Scobey, Montana, and that in 1919 and 1920 he worked in the shipping room of the milling company. While at the light plant he was firing and stoking the steam boiler, shoveling coal into the furnace. The work which he was doing was the type of work that would be considered as manual labor, and required physical exertion (Tr. 102).

"At the milling company he handled sacks of flour and wheat, and delivered to customers. These sacks of flour weigh 48 pounds and 98 pounds (Tr. 103)."

Mr. L. C. McPherson testified in behalf of the government, by way of deposition, in part as follows:

"From February to May, 1922, the assured was in vocational work in training for me, helping to take care of the feeding of poultry and also in hatching of baby chickens (Tr. 103-104). In the carrying of food for the chicken coops, approximately 30 pounds to 40 pounds were required to be carried (Tr. 104). He was required to carry that feed from 50 to 150 feet. It was level ground until he came to the door of the poultry house, and then there was a six-foot stairs to go up (Tr. 104).

"When he first came, for the first four or five weeks, he assisted me with the dairy work, and that consisted of milking about six cows and carrying the milk to the separator room. He milked six cows and carried the milk about 300 feet to the separator room (Tr. 104). His

duties, as a whole, required a good deal of walking and remaining on his feet during the day. The hours he was required to keep with regard to going to work and quitting work were approximately twelve hours, and this required his attention every day of the week (Tr. 104).

"During this period of time he complained of his lungs, said he had been gassed. He performed his work and duties satisfactorily (Tr. 105). He did not leave by reason of any physical disability. I do not remember that he was lame or limped, and if he had been noticeably lame I would have had opportunity to observe that (Tr. 105). He appeared to have a cough, or lung difficulty, which was mild and did not interfere with his work (Tr. 105). He did not have occasion to be off his work because of sickness."

Mrs. McPherson testified by way of deposition on behalf of the government in part as follows:

"The plaintiff would carry a ten-gallon can of milk, and the can weighed 80 pounds. I did not observe any physical disability. He complained of his lungs, and seemed to have the appearance of being easily fatigued. I would not say he had a very noticeable cough, and was not absent from his work because of sickness at any time, and his employment was regular every day of the week (Tr. 107). He did not leave by reason of his health (Tr. 107).

"When he went to see his family in Spokane every fortnight, he had to walk to and from the station, three-quarters of a mile, carrying a suit case."

The records of the University of Idaho were admitted in evidence, which disclosed that he first attended there as a student in June, 1922, and continued until March, 1923.

Testimony of Ella Olesen (Tr. 108-113) discloses the subjects taken and the grades received by the assured during his period as a student at the University of Idaho.

Dr. Pfeiffer, a government doctor, examined the assured in 1925, 1926 and 1927 (Tr. 114) and stated that on his first examination in March, 1925, he found nothing that would enable him to say that the assured could not work. In December, 1925, he found changes which indicated the man had a productive arthritis, which he did not find in the x-rays in March, 1925 (Tr. 117). In the next examination in March, 1926, he found early hypertrophic arthritis, worse than the condition found in December. The x-ray condition found in March, 1926, suggested that the condition was not more than a year or two old. The striking feature of the examination was the progression noted from time to time of the arthritic process ((Tr. 117). In December, 1926, he found that the man was decidedly worse, and characterized the case as progressive arthritis (Tr. 117).

Dr. Seibert testified, among other things on behalf of the government, that he, a government doctor, examined the assured in December, 1925 and August, 1927. In 1925 he made a diagnosis of arthritis of the sacro-iliac, and stated at that time that his opinion was that condition was of short duration—meaning, probably, a year or a year and a half. The conditions he found at that time did not preclude work of a general character, (Tr. 123-124). In 1927 he found the same condition, except there had been a progression of the arthritic condition (Tr. 124). In 1927 he stated that he did not find any heart disability (Tr. 123).

Dr. Albert C. Feaman, a government doctor, testsified in part as follows, on behalf of the defendant at the trial below:

> "That he examined the assured in December, 1925, and that at that time there were no complaints about pains over the heart (Tr. 128). The heart examination showed no evidence of any heart trouble at that time. He found, however, evidence of chronic fibrous pleurisy, adhesions of the diaphragm, and lungs; and retraction of the chest (Tr. 128)."

Dr. Feaman stated that he never heard of a situation where an injury in 1918 or 1919 would cause an attack of angina pectoris in January, 1932 (Tr. 131), and stated that in his examination of the

heart in October, 1931, he did not find any evidence of angina pectoris, and stated likewise that in every heart examination there are a series of questions which the patient is asked in order to get certain information, and one of them is in regard to a precordia pain. This precordia pain was not given as a symptom by Mr. LaFavor at that time. The doctor further stated that the precordia pain is the outstanding pain which causes one to have fear of death. The doctor did not find any abnormal condition of the heart in his examination in October, 1931 (Tr. 134).

After Dr. Feaman's testimony, both parties rested their cases, and the government's motion for an instructed verdict was denied by the Court, and exception noted (Tr. 134-135).

Plaintiffs' exhibit No. 14, which is the assured's service record, shows the usual declaration of the enlisted man prior to separation from service to the effect that he had no disability as a result of his military service. And likewise, it is proper to call to the attention of the Court the fact that in government exhibits A-6, A-7, A-8 and A-9, which were applications for reinstatement of his insurance from 1921 to 1926, the assured repeatedly affirmed in signed statements that he was not per-

manently and totally disabled. In government's exhibit A-2, which is form 526 and is in connection with the assured's claim for compensation, is a signed statement to the effect that subsequent to discharge he worked at the electric light plant at Scobey, Montana, at a wage of $90.00 per month, and this is likewise disclosed in government's exhibit A-3, wherein assured's signed statement gives his occupation as a stationary gas engineer from April, 1919, to June 30, 1919, at a wage of $90.00 per month. This is apparently the work referred to at the light plant. He states in the same exhibit that he worked at the flour mill from July, 1919, to January, 1920, but other witnesses give a longer period of employment for his work at the flour mill—noticeably W. B. Heppner (Tr. 101) who said he worked there a year. His wife states that he worked in the flour mill from March, 1920, until October, 1920 (Tr. 62), which is a period of eight months, and longer than the period that the assured states he worked at the flour mill in defendant's exhibit A-3.

It will be noted that Mrs. LaFavor, his wife, testified that he went to the Northwestern Business College almost immediately after he left the flour mill (Tr. 62-63), and this corresponds with

the testimony of Mr. Westmore of the Northwestern Business College, that he started his vocational training there in October, 1920.

In government's exhibit A-2, which is assured's claim for compensation, he states on item No. 11 that he has only partial physical disability; and likewise on item No. 11 in defendant's exhibit A-3, in answer to the question as to the nature and extent of disability, he answered: "Farmer by occupation; can no longer do heavy work. Fifty percent disability". It is important to note that in neither of these exhibits does he claim that he was totally and permanently disabled, although they were signed subsesquent to the time of the lapsation of his insurance.

In plaintiff's exhibit A-5, a letter signed by Mrs. LaFavor, the wife of the assured, in December, 1925, it is stated that for the past ten or twelve weeks only she had done all the work *which was usually done by her husband,* the assured.

In government's exhibit A-20 and A-21, which are reports of physical examinations made by government doctors of the assured in 1921, it is important to notice that examinations disclose negative findings as to the heart and the prognosis on the

disabilities found was favorable.

Government's exhibit A-21 shows imbeded and infected tonsils, with a condition of pyorrhea in the teeth, both of which were infectious diseases. A tonsillectomy was recommended, according to government's exhibit A-21.

In summing up, with reference to the plaintiffs' lay and expert testimony, Dr. Gearing stated not that the assured was unable continuously in his opinion to follow a substantially gainful occupation at the time of the lapse of his insurance, but merely ventured the opinion that at the time of his examination in 1931 the man could not perform farming work. He was unable to tell of how long a standing the arthritic condition was, and stated that the arthritis may have been due to an infection, such as prostatitis, tonsilitis or other infectious disease rather than an injury in the service. It was likewise undisputed that the arthritic condition was a progressive condition (Tr. 43-44). It being a progressive disability, it is not surprising that the doctor was unable to venture an opinion that the disability was such that the man could not work at the time of the lapse of his insurance, or that it was then a total disability. For, as the government doctors testified, it may have and probably did have its

inception at a time many years subsequent to the expiration of his term contract.

Dr. Steele stated that not many people can have angina pectoris for ten or twelve years and still survive, but there are cases on record that do. He did not testify that the plaintiff was unable to follow continuously a gainful occupation, in his opinion, at the time of the examination, or at the date of discharge. He found no active tubercular condition, and found no physical or objective findings as to any heart disability. Dr. Steele, in examining the patient in 1931, did not even take any history of the assured's industrial activities since discharge, or even inquire about the history of vocational training of the assured. It is significant that, subsequent to the time that the plaintiffs now claim that the assured was permanently and totally disabled under his war risk insurance contract, he married and raised a family of three children. It is likewise significant that the first time he ever manifested an excitable condition, or extreme anger toward his wife, was in 1923, and the occasion was his run-down condition. This was four years after the lapse of his term insurance contract.

Subsequent to discharge, and from April to July, 1919, he worked at an electric light plant,

shoveling coal, at a substantially gainful wage. From March, 1920 until October, 1920, he worked at a flour mill, handling sacks and filling sacks with flour, doing heavy manual labor at a substantially gainful wage. He was in vocational training from October, 1920 until March, 1923, being at the Northwestern Business College in Spokane from October, 1920 until March, 1922. And from March, 1922 until June, 1922, he was with the McPhersons in Idaho in placement training on a poultry ranch. From June, 1922 until March, 1923, he was in institutional training at the University of Idaho. From 1923 until 1928, when he sold his ranch, he was on the farm near Colville, Washington, and was performing some work, according to the testimony. Later on he helped build his home in Tacoma. *Unglaub vs. U. S.*, 57 Fed. (2d) 650.

There was no sufficient medical or lay testimony to warrant submission of the case to the jury. The burden of proof was, of course, on the plaintiffs. Their long delay before bringing this suit was strong evidence that he was not permanently and totally disabled at the time the policy lapsed.

In *United States vs. Nickel*, 70 F. (2d) 873 it was held that the insurance contract in the case obligated the government to indemnify in the event

of death or total disability during the life of the policy. In the instant case it was incumbent upon the plaintiff to establish permanent and total disability before the lapse of the policy.

Eggen vs. United States, 58 F. (2d) 616; *United States vs. Pullig*, 63 F. (2d) 379; *United States vs. Hill*, 62 F. (2d) 1022.

The insurance does not cover total temporary or partial permanent disability. While a great deal has been said as to the phrase "permanent and total disability", no fixed rule has been established as applicable to all cases, but the circumstances of each case must largely conform in construing this phrase of the contract.

As said by the Supreme Court of the United States in *Lumbra vs. United States*, 290 U. S. 551, in an opinion by Mr. Justice Butler:

> "The various meanings inhering in the phrase make impossible the ascertainment of any fixed rules of formulae uniformly to govern its construction. That which sometimes results in total disability may cause slight inconvenience under other conditions. Some are able to sustain themselves, without serious loss of productive power, against injury or disease sufficient totally to disable others. It cannot be said that injury or disease sufficient merely to pre-

vent one from again doing some work of the kind he had been accustomed to perform constitutes the disability meant by the act, for such impairment may not lessen or affect his ability to follow other useful, and perchance more lucrative occupations. Frequently serious physical impairment stimulates to successful effort for the acquisition of productive ability that theretofore remained undeveloped.

"The above-quoted administrative decision is not, and manifestly was not intended to be, an exact definition of total permanent disability or the sole guide by which that expression is to be construed. If read literally, every impairment from time to time compelling interruption of gainful occupation for any period, however brief, would be total disability. And, if such impairment were shown reasonably certain not to become less, it would constitute total permanent disability. Persons in sound health occasionally suffer illness as 'total disability' while it lasts. But, clearly, it is not right to say that, if they remain sound but reasonably certain throughout life, occasionally to have like periods of temporary illness, they are suffering from 'total permanent disability'. Such a construction would be unreasonable and contrary to the intention of Congress. 'Total disability' does not mean helpfulessness or complete disability, but it includes more than that which is partial. 'Permanent disability' means that which is continuing as opposed to what is temporary. Separate and distinct periods of temporary disability do not constitute that which is permanent The mere fact that one has done some work after the lapse of his policy is not of itself sufficient to defeat his claim of total permanent disability. He may have worked when really unable and at the risk of endangering his health

> or life. But manifestly work performed may be such as conclusively to negative total permanent disability at the earlier time."

Of course the government has in mind that the question in the case is: Did the Court err in directing a verdict for the government, and that the ruling must be applied that the evidence must be considered in its aspect most favorable to the plaintiffs, and that the weight of the testimony is always for the jury to determine, and that therefore the trial Judge should not direct a verdict unless the evidence is so conclusive that were a verdict directed for the plaintiffs the Court, in the exercise of a sound judicial discretion, would be compelled to set it aside. *Gunning vs. Cooley*, 281 United States 90; *Lumbra vs. United States*, supra.

And, as said by Judge Neterer in *United States vs. Hill*, 61 F. (2d) 651 (9th CCA):

> "Nonemployment, of itself, is not evidence of impairment. And it is obvious that facts known or within the power of the plaintiff to produce are not presented. See *Massey v. United States*, (D. C.) 46 F. (2d) 78; *Third National Bank & Trust Co. v. United States* (C. C. A.) 53 F (2d) 599. Nor is smoke, as shown, causing cessation of work, or that the work was too hard, evidence of total and permanent impairment. Nor is voluntary cessation of special work, rather than compulsory cessation by reason of physical

and/or mental inability to work, of itself, evidence of total and permanent disability.

"This case is clearly distinguished from *United States v. Lesher* (C. C. A.) 59 F. (2d) 53. There is no evidence which raises a dispute about which reasonable men might honestly differ. *Day v. Donohue*, 62 N. J. Law, 380, 41 A. 934. No competent evidence of relevant consequence, clear, certain, carrying the quality of proof, having the fitness to produce conviction in the minds of reasonable persons, such that reasonable persons may fairly differ as to whether or not it proves the fact in issue. *Milford Copper Co. v. Industrial Comm.*, 61 Utah, 37, 210 P 993.

"We appreciate that the court may not look behind the finding of the jury predicated upon substantial evidence and when it is a matter of weighing the evidence, which is the sole province of the jury; but when the challenge is want of substantial evidence, the power of the court must be asserted as a matter of law."

There is likewise in the case at bar evidence showing that the assured was examined at various hospitals, and there is a dearth of testimony as to his condition at those times, and the situation is analagous to that stated by Judge Neterer in *United States vs. Hill*, supra, and that remarked upon by the late Judge Rudkin in *United States vs. Blackburn*, 33 F. (2d) 564 (9th CCA).

In *Proechel vs United States*, 59 F. (2d) 648, in a case where an arthritic disability was involved,

the Court of Appeals for the Eighth Circuit stated that the plaintiff had the burden of showing lack of mental capacity or of opportunity or of both, to acquire such training as would fit him for some reasonably remunerative employment. The following language of Judge Otis, in the Proechel case is peculiarly applicable to the facts in the case at bar:

> "Viewed in the light most favorable to the plaintiff, the evidence did not prove that the insured was permanently incapacitated from carrying on continuously any substantially gainful occupation not requiring free use of knees and ankles. There are such occupations. There was no showing that the insured was wanting in capacity to follow them or inability or opportunity to acquire training necessary to follow them or some one of them. One who would prove permanent total disability must prove there is that in the nature of the impairment causing disability, which, considering the capacity of the individual, will make it impossible for him through the probable duration of his life ever continuously to carry on any substantially gainful occupation. The element of permanency and all the elements essential to make a case must be proved. They cannot be found by speculation, guess, or surmise.

It will be noted that in the Proechel case the assured died in less than three years from the date of his discharge, and that a jury might have been warranted in that case in finding that while he lived he was totally disabled within the meaning of

the accepted definition. But in that case, as in this, where the death was many years after the lapse of the policy, the death did not result from the bodily impairment which caused his disability.

In the case at bar, it cannot be conceded that there was sufficient showing of total disability to warrant the submission of the case to the jury, but assuming for the purpose of argument that there was sufficient evidence showing the total inability at the time of the lapse of the contract on the part of the assured to perform any gainful work in a reasonably continuous manner, still there was a total failure to prove permanency of said disability.

As said further by Judge Otis in *Proechel vs. United States, supra*:

> "The fact of death, a death resulting from a cause unrelated to the alleged impairment, is no more to be considered in determining whether the total disability of September 27, 1919, was permanent than if he had been killed in an automobile collision or suffered death from a stroke of lightning. It was for plaintiff to present substantial proof that the total disability existing on September 27, 1919, was founded on conditions then existing which rendered it reasonably certain on that date that the then total disability would continue throughout the life of the insured. The finding of permanency must be based on conditions existing before lapse of the insurance contract, not upon conditions thereafter coming into existence."

And as said by the Supreme Court in *Lumbra vs. United States, supra*:

> "And in the absence of clear and satisfactory evidence explaining, excusing or justifying it, the petitioner's long delay before bringing suit is to be taken as strong evidence that he was not totally and permanently disabled before the policy lapsed."

See also *United States vs. Johnson*, 70 F (2d) 399.

As was said by Judge Wilbur in *Evans vs. United States*, 43 F. (2d) 719 (9th C. C. A.):

> "The appellants case did not depend upon the question of the service origin of the disease from which he died, but upon the degree of his disability therefrom; unless that disability was total and permanent during the life of the policy, the appellant could not recover."

And as said by this court in an early case on appeal from the Western District of Washington, in *United States vs. McPhee*, 31 F. (2d) 243 (9th C. C. A.), speaking through the late Judge Dietrich:

> "In view, however, of another trial, we deem it proper to say that in our judgment the motion for a directed verdict was ample to challenge the sufficiency of the evidence, and should have been sustained.
>
> "We can find no evidence in the record showing or tending to show that the appellee was

> totally and permanently disabled at any time before the policy expired. * * *
>
> "Total and permanent disability within the meaning of a war risk insurance policy does not mean absolute incapacity to do any work at all. But there must be such impairment of capacity as to render it impossible for the assured to follow continuously some substantially gainful occupation, and this must occur during the life of the contract.
>
> "War risk insurance is not a gratuity but an agreement by the Government, on certain conditions, to pay the assured certain sums per month if he becomes totally and permanently disabled while the contract of insurance is in force. The burden is on one suing on such a contract to show that he was in fact permanently and totally disabled, at some time before the contract lapsed."

And in *Falbo vs. United States*, 64 F. (2d) 948 (9th C. C. A.), this Court stated as follows in its opinion:

> "While, on this evidence, a finding of total disability in May, 1919, and of permanent disability in a much later period, would be justified, we concur in the judgment of the District Judge that it fails to show a condition of permanent disability in May, 1919, a disability then 'reasonably certain to be permanent during lifetime". *United States vs. McCreary*, 61 F. (2d) 804, 808 (C. C. A. 10, 1932). The testimony of plaintiff's Physician in answer to questions by the court indicates the speculative character of the evidence on this material point.

'Q. Suppose at that time, back in July, 1919, the Fourth, that he had taken proper treatment, hadn't worked, and followed the proper course under medical direction, is it reasonably likely that he would have recovered?

'A. He may have.

'Q. Is it reasonably likely he would not have?

'A. Well, he may have recovered and he might not have.'

"We concur in and deem completely applicable here the views so well expressed by Judge Mcdermott in the Rentfrow Case: 'Such cases as these, which are as frequent as they are unfortunate, make a strong appeal to the sympathies. An incipient tubercular stands at a crossroads: If he continues his ordinary activities, his condition is a hopeless one. On the other hand, if he will follow a program of complete rest and wholesome nourishment for an indicated period, the chances are strongly in favor of an arrested condition and a substantial cure. Many times the choice is a hard one, particularly when the economic circumstances of the insured are considered. But we cannot believe that liability upon these contracts of insurance should be determined by the conduct of the insured after the policy has lapsed, nor by economic circumstances which may influence that conduct. We can find no support, in this record, for a finding that the tuberculosis with which insured was afflicted had progressed to the incurable stage when his policy lapsed. * * * "

"Likewise, in this case, the record, in our

judgment, does not justify a finding that in May, 1919, the total disability, due to incipient tuberculosis, was reasonably certain to be permanent that is, to continue for appellant's life; his own testimony, as well as the entire record, left the question of whether or not his disease was then incurable entirely in the realm of speculation. See too, *Eggen vs. United States*, 58 F. (2d) 616 (C. C. A. 8, 1932); *United States vs. Stack*, 62 F. (2d) 1056 (C. C. A. 4, 1933; *Walters vs. United States*, 63 F. ((2d) 299, (C. C. A. 5, 1933); *Wise vs. United States*, 63 F. (2d) 307 (C. C. A. 5, 1933)."

And so in conclusion on the sufficiency of the of the evidence, we say that on the evidence presented below, to allow the verdict to stand to the effect that the assured was permanently and totally disabled before lapsation of his term insurance, would be a mere guess unsupported by any substantial evidence. *Blair vs. United States*, 47 F. (2d) 109. *Nicolay vs. United States*, 51 F. (2d) 190. *United States vs. Rodman*, 68 F. (2d) 351.

The record shows an absolute absence of substantial proof of assured's total and permanent disability during the life of the policy, and the Judge below should, under the evidence, have directed a verdict for the United States.

II.

This portion of the Brief covers assignment of errors 5, 6, 9 and 10 (Tr. 149-152). The government's complaint in brief is that the trial Court allowed lay witnesses to testify to hearsay statements and complaints which they heard the assured make subsequent to the lapse of his policy. Assignment of error No. 5 will be found to have occured on page 23 of the record. Assignment of error No. 6 will be found to have occurred at pages 26 and 27 of the record. Assignment of error No. 9 will be found to have occurred on pages 60 and 61 of the record. Assignment of error No. 10 will be found to have occurred on pages 68 and 69 of the record. These rulings of the Court below allowing lay witnesses to testify as to hearsay matters in the form of complaints, and to statements which they heard the assured make at different times constituted the erroneous admission of hearsay and self-serving declarations in evidence, and deprived the government of its right of cross examination. *Seals vs. United States*, 70 F. (2d) 519. *United States vs. Balance*, 59 F. (2d) 1040. *Third National Bank vs. United States*, 53 F. (2d) 602. *Demeter vs. United States*, 66 F (2d), 188. *United States vs. Buck* (5th

C. C. A.) decided May 22, 1934, and as yet not reported.

Ignoring the hearsay rule in this type of litigation might easily afford the opportunity to open the door to fraud. A physician is not allowed to testify as to history taken from the patient, if the history was taken and the examination made only for the purpose of giving testimony. *Tyrakowski vs. United States*, 50 F. (2d) 766. If there is such a stringent rule regarding the admissibility of complaints made to a physician, why should a lay witness be allowed to testify as to hearsay and self-serving complaints and statement made in his presence by the plaintiff, who subsequently seeks to collect from the government on his insurance contract.

III.

The last assignments of error to be argued are assignments 7 and 8 (Tr. 151 which will be found to have occurred on pages 36 to 38 inclusive in the record. The testimony briefly shows (Tr. 36) that the assured was referred to a doctor upstairs in the same building where Dr. Gearing had his office, for the purpose of taking an x-ray, and the patient came down about ten minutes later with the

picture after it was developed (Tr. 36). Dr. Gearing, a witness, interpreted the picture and attempted to identify it preparatory to its introduction in evidence. The doctor was not present at the time the picture was taken.

Dr. Gering gave no testimony as to the type or accuracy of the machine by means of which the picture was taken. He did not state that the picture was a correct representation of the internal portions of the assured's body and did not personally take the picture, and was not present at the time the same was taken (Tr. 36-38). Where, therefore, was there any competent evidence sufficient to identify and warrant the introduction of plaintiffs' exhibits 11 to 13 in evidence? The admission of the same over the objection of the government constituted prejudicial error.

In *Ligon vs Allen*, 157 Ky 101, 162 S. W. 536, 51 L. R. A. (N. S. 842) the Supreme Court of the State of Kentucky held that to render an x-ray photo admissible in evidence, its accuracy must be established. In that case the Supreme Court of Kentucky said as follows:

> "If, however, the photograph should not represent the fact as the witness saw it, it is not ad-

missible; and the only person who can show that it does represent the fact as the witness saw it is the witness himself. It necessarily follows, therefore, that, where the witness fails to make an x-ray photograph admissible by testifying to its accuracy, it is not admissible and should be rejected. This rule is recognized by all the authorities. See *Stewart, Legal Medicine*, Sec. 13; 2 *Wharton & M. S. Med. Jur.* Sec. 564; 3 *Witthaus & B. Med. Jur.* Sec. 779.

"In 1 *Greenleaf on Evidence*, 16th ed. Sec. 439h, it is said: 'The use of photographs taken by the vacuum tube--Roentgen rays--may involve slightly different principles. Since the operator will usually not have perceived the object, usually a concealed bone, with his ordinary organs of vision, he will not be able to put forward the photograph as corresponding to the results of his own observation; nevertheless, if he can testify that the process is known to him (by experience or otherwise) to give correct represesntations, the photograph is in effect supported *by his* testimony and stands on the same footing as a photograph of an object whose otherwise invisible details have been rendered discernible by a magnifying lens.'

"The rule above announced has been more than once approved by this court. See *Louisville & N. R. Co. v. Brown*, 127 Ky. 746, 13 L. R. A. (N. S.) 1135, 106 S. W. 795, and *Bowling Green Gaslight Co. v. Dean*, 142 Ky. 686, 134 S. W. 1115. In the last-named case we said: 'Of course, the accuracy of a photograph as a correct reproduction of what it purported to show should be established to the satisfaction of the court before being admitted as evidence, but when its accuracy is shown, we have no doubt of its admissibility. *Wigmore, Ev.* Secs. 790-797; *Louisville & N. R. Co. v. Brown*, 127 Ky. 732, 13 L. R. A. (N. S.)

1135, 106 S. W. 795; *Higgs v. Minnesota, St. P. & S. Ste. M. R. Co.*, 16 N. D. 446, 15 L. R. A. (N. S.) 1162, 114 N. W. 722, 15 Ann Cas. 97; *Dederichs vs. Salt Lake City R. Co.*, 35 L. R. A. 802, and note, (14 Utah, 137, 46 Pac. 656); 2 *Elliott, Ev.* Secs. 1224-1228.' See also *Geneva v. Burnett*, 65 Neb. 464, 58 L. R. A. 287, 101 Am. St. Rep. 628, 91 N. W. 275, 12 Am. Neg. Rep. 104; *Mauch v. Hartford*, 112 Wis. 50, 87, N. W. 816, 11 Am. Neg. Rep. 63; *Miller v. Mintun*, 73 Ark. 183, 83 S. W. 918; *Bruce v. Beall*, 99 Tenn. 303, 41 S. W. 445; *Elzig v. Bales*, 135 Iowa, 208, 112 N. W. 540; *Eckels v Boylan*, 136 Ill. App. 265.

"Applying this well-settled rule to the facts of the case, it is apparent that appellee failed to establish the preliminary requirements necessary to make the photographs admissible. Dr. Ford merely states that he took the photographs. He does not state that they correctly represent what he saw, or how they were taken, or that he had ever taken an x-ray photograph before, or knew anything about how they ought to be taken. We are given no assurance as to the character or accuracy of his x-ray machine, or its condition or working order. While it may not be necessary to establish all of these facts in order to make the photographs admissible under the rule above stated, it is clear the rule requires that the accuracy of the photographs must be so established, for, if they do not show what the witness saw, they have no place in the case. In this respect the testimony of Dr. Ford is wholly insufficient; and, as no other witness testified upon this subject, the circuit court should have sustained appellant's objection to the admission of the photographs. In view of the conclusion reached, it is unnecessary to consider the other errors assigned.

"For the error above indicated, the judgment is reversed, and the case remanded for a new trial."

For the aforementioned errors, judgment of the court below should be reversed and the cause remanded for a new trial.

Respectfully submitted,

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